Supreme Court, U.S.
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No. 99-1207

IN THE

Supreme Court of the United States

OLIN CORPORATION,

Petitioner,

v.

ROSALIE CULLEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

Cullen vehemently disputes Olin's Statement of the Case which reflects Olin's hopeful but spurned offerings at trial.

First, Olin presents its version of how Cullen's position was eliminated, what happened to Cullen's duties, and why she was not retained. The Olin version leaves out important facts that the jury considered. For example, the jury heard Olin claim that Cullen was terminated because her position was eliminated and there was a no-bumping policy. The no-bumping policy is not mentioned in Olin's Petition, probably because the jury also heard evidence that the policy was not in fact applied as originally represented.

Olin contends that Cullen's duties were assigned to "a newly-created position known as event marketer" and that her other duties were either "outsourced" or assigned to several different people. (Petition for Certiorari, page 2). In the very next paragraph of the Petition, however, Olin states that *two* people were assigned to the event marketing position. In a defense notable for its contradictory assertions, this shifting as to what happened to Cullen's duties could easily have led the jury to conclude that Olin was obfuscating. In another contradiction, dealing with a retained employee, Judy Eberhart, Olin originally asserted that it *did not assign any* of Cullen's duties to Eberhart (Plaintiff's Exhibit 21, Defendant's Answers to Interrogatories), then others testified that a portion of Cullen's duties went to Eberhart (Defendant's Brief to Seventh Circuit Court of Appeals, page 27). At yet another point, Olin steered clear of Eberhart, when it presented the jury with its cost savings from discharging Cullen. Olin had its personnel director testify to Cullen's replacements' respective salaried — conspicuously excluding Eberhart, leaving the impression that Eberhart was not, in fact, part of the picture. (Tr. 492-94; 504-06).

Nonetheless, Olin makes the point that most of Cullen's duties went to persons who were fewer than ten years younger than she. First, the statement is simply is not true when the evidence is viewed in the light most favorable to the verdict. Second, even if true, it did not seem to bother the Seventh Circuit. Third, even including Eberhart, most of the people who took Cullen's duties were *more* than ten years younger than she.

Olin somehow concludes that Cullen's "principal argument" at trial was that she was better qualified than Judy Eberhart. To the contrary, Cullen's "principal argument" at trial, if there is such a creature worthy of legal review, was that Cullen was discharged because of her age. Cullen adduced evidence of an overwhelming number of lies and contradictions as to the various reasons Olin presented for RIF'ing her; she argued from Olin's presentation of misleading statistics that the RIF was targeted at older workers; and, she presented testimony from four witnesses that Olin's president gave as his statement of operative intent that the company, in executing the RIF, was going to be getting rid of its "older, antiquated workers."[1]

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1. Four witnesses testified to extremely damaging comments made by the president, Doug Cahill. In its Statement of the Case, Olin attempts to minimize the impact of these statements by pointing out that the witnesses were former employees who had pending age discrimination cases. Of course, this same argument was made to the jury with no success; Olin's counsel extensively cross-examined the witnesses about their cases, so the jury knew full well that the four witnesses had a potential for bias. The jury *still* believed the four witnesses and disbelieved Cahill's denial of the statements.

REASONS FOR DENYING THE WRIT

This case was decided on the jury's resolution of detailed factual disputes. Did Doug Cahill say that in executing the RIF, Olin was going to get rid of older workers? Did Olin lie about its reasons for selecting Cullen? Was there a "no-bumping" policy or was that just an excuse offered to justify Cullen's firing? What *were* Cullen's duties by the time of the RIF and where did those duties go? Did Harlan Kent ignore performance ratings and, if so, why?[2] This was a factually intensive case, with numerous exhibits and witnesses. It was decided on its facts and reviewed by the Seventh Circuit on its fact and, thus, even though the

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2. In its Statement of the Case, Olin makes much of the fact that Harlan Kent (the person who put Cullen's name to paper as one of the RIF'ed employees) claimed that he did not even look at Cullen's personnel file, arguing that the jury must have second-guessed his business decision to ignore Cullen's exemplary record. Olin's interpretation of what the jury must have done with that particular piece of evidence is only one possibility of many, and it is equally plausible that the jury concluded that Kent lied and that he *did* look at Cullen's file. He was, after all, a highly credentialed businessman who had just arrived at the company and who claimed, incredibly, he did not consider performance in deciding who to fire and who to keep. The argument that Kent ignored employment history makes even less sense and was less believable in light of the fact that Cullen's performance marks, used in worksheets for the RIF, contained falsely low, and even one completely fabricated, ratings. (Tr. 286-89; Plaintiff's Exhibits 32, 34). The false ratings show that ratings *were* considered, and that Olin took the trouble to lie about them in its documents. Finally, the jury could well have inferred that Kent was being candid and that he truly did not look at Cullen's file and that he chose not to do so because there was no need: after hearing Olin's president announce that the company was going to RIF "older, antiquated workers," why bother looking at files — unless he needed to look up Cullen's birthday?

case is very important in the life of Rosalie Cullen, it is not particularly significant in the scheme of ADEA jurisprudence.

Olin tries to attach greater, broader significance to the case by arguing that it is the victim of an "explosion" of ADEA litigation. The fact that Olin is reduced to arguing victim status underscores the tenuous nature of Olin's quest for salvation, having raised all of its substantive arguments in the Seventh Circuit and receiving only the grant of a new trial based on a point of evidence.

Olin's current argument is both political and illogical. First, it cites to some unverified statistic relating to the raw number of age discrimination opinions. Then, with astounding sleight-of-hand, Olin refers to an increase in the number of employment discrimination cases (not separating out which of those were age discrimination cases) and concluding that the number of age discrimination cases has increased. Based on this wobbly scaffold Olin concludes, with no cited source whatsoever, that the reason for the explosion is not an increase in actual age discrimination but, rather, the ease with which lawyers are able to prove a case and the lure of six and seven figure judgments. Could not the claimed increase in age discrimination cases just as easily be the coming of age of baby boomers and the fact that there are more people entering the protected age group? Could it be that employers *are* indeed discriminating in bolder ways, this case being a perfect example: where the thirty-something president of the company announces that the RIF will get rid of older, antiquated workers? Without scientific study of the reasons, there is no reliable explanation for the cause of the supposed increase, and certainly no political need for this court's review.

Age discrimination, like other forms of discrimination, is ugly and hurtful to society. Congress apparently thought there were sound reasons for enacting the ADEA, other than luring attorneys and plaintiffs. Congress found, *inter alia,* "the setting of arbitrary age limits regardless of potential for job performance has become a common practice" and "the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce." 29 U.S.C. §§ 621(a)(2) and (4). Thus, the purpose of the ADEA was not to entice the greedy to the courthouse in an open season on commerce, but rather to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b).

Olin argues that this Court must review this case to restrict the ADEA to its intended purpose. The ADEA's intended purpose was to eradicate age discrimination by making it illegal. This case represents no variance from that principle — Olin fired Rosalie Cullen because of her age. The only grand lesson here, other than employers should make decisions without regard to age and, perhaps, company presidents should be more circumspect in their public announcements, is that sometimes employees and juries hold employers accountable for illegal decisions.

I. The Reeves Decision Does Not Affect The Instant Case

Olin argues that the court should grant its Petition because it will likely be affected by the outcome of *Reeves v. Sanderson Plumbing Products, Inc., No. 99-536*, presently pending before the court. Apart from the fact that this case and *Reeves* were both filed under the ADEA, they have little in common including the bases for the respective courts of appeals' decisions.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 197 F.3d 688 (5th Cir. 1999) the plaintiff was discharged, not as part of a reduction-in-force. He stated a prima facie case and adduced evidence that the reason articulated by Sanderson for his discharge was not accurate. Reeves did not have evidence of "mendacity" and, according to the Fifth Circuit, Reeves did not have additional proof that Sanderson was motivated by age — what has come to be known as "pretext plus." The issue of the level of proof needed to establish age discrimination is now before this court. While Cullen would strenuously disagree with the reasoning behind the pretext plus line of cases as being contrary to this court's decision in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993), the standard used makes no difference here.

Olin argues that Cullen's case will be governed by this court's ruling in *Sanderson* because her case is weaker than the plaintiff's case in *Reeves*. First, Olin is assuming that this court will rule in *Reeves* that the plaintiff did not have a submissible case. Second, in this case, the Seventh Circuit was unconcerned with either pretext or pretext-plus, reviewing the jury's verdict to see if it was supportable by the evidence and specifically noting that its review was to be stringent where witness credibility is involved.

(Petition for Certiorari, App. A, pages 10-11). Third, Olin's argument is nothing more than that — pure argument. There is no known scale for measuring the relative strength of these two cases, particularly when the facts of one of the trials — with many witnesses and exhibits — were distilled down to a few pages from an appellate court and even fewer in the paragraph-long summary in the Petition. (Petition for Certiorari, page 6).

If summaries are to be weighed, however, it should be noted that unlike Reeves, Cullen presented overwhelming evidence of mendacity as well as evidence that age was Olin's true reason for selecting her. From the secret VAR meetings (kept secret, according to Olin so as not to upset employees about layoffs, despite the fact that the secret meetings were convened *after* the RIF was announced) (Tr. 550-54), to Olin's lies about the "no-bumping" policy, to Olin's fabrication of employee ratings, to Olin's saying one thing to the EEOC about the RIF selection criteria and a different thing at trial (Tr. 295; Tr. 367-69, Exhibit 19), the evidence of Olin's mendacity conduct goes on and on. With regard to the additional evidence of age discrimination, Doug Cahill's statements as to the direction of the RIF and the statistical evidence, offered by Olin itself, were among the items that showed that RIF decisions were based on age. (Tr. 514-20, Defendant's Exhibits 15b and 15c).

II. There Is No Conflict Among the Circuits As To The Role Of A Prima Facie Case After A Trial On The Merits

Olin argues that the court should review the Seventh Circuit's decision because there is a conflict among the circuit courts as to the relevance of a prima facie case to the disposition of a motion for judgment as a matter of law. Olin

cites to absolutely no case in which a circuit court has reversed a plaintiff's jury verdict based on a failure to state a prima facie case. In the very case that Olin is using to justify this Petition, the Fifth Circuit stated the law: "Indeed, when as here, a case has already been tried on the merits, whether the plaintiff properly made out a prima facie case is no longer relevant. *United States Postal Service Bd. Of Governors v. Aikens*, 460 U.S. 711, 715, 75 L.Ed. 2d 403, 103 S.Ct. 1478 (1983)." *Reeves*, 197 F.3d at 692, n.17. There is no conflict and no need for review.

CONCLUSION

The jury's decision in this case was well-supported by the evidence. No new legal ground was being tread upon. Therefore, Cullen respectfully prays the Court deny Olin's petition for certiorari.

Respectfully submitted,

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